United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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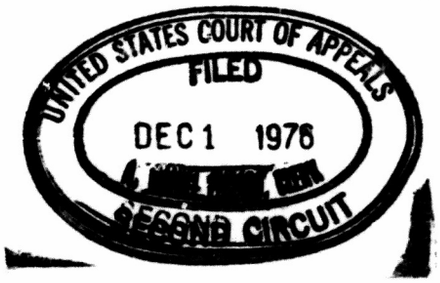
76-7410

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT



Docket No. 76-7410

B P/S

AMERICAN GREETINGS CORPORATION,
Appellant,

v.

WESTRANSCO FREIGHT COMPANY, INC.
and
ASSOCIATED FREIGHT LINES, INC.
Appellees.

ON APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S REPLY BRIEF

Martin S. Snitow
Attorney for Appellant
277 Park Avenue
New York, New York 10017

OF COUNSEL:

Arsham & Keenan
277 Park Avenue
New York, New York 10017
(212) 759-1000

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SUMMARY OF ARGUMENT

A claim for purposes of Section 2(b) of the bill of lading is a writing or series of writings which, however informally, identifies the shipment and indicates an intention to hold the carrier responsible for loss or damage. Georgia, F. & A. Ry. v. Blish Milling Co., 241 U.S. 190, 198 (1916). The claim may be filed by the shipper, the consignee or by a party with an interest in the goods, or by anyone lawfully acting in their behalf. Delaware, L & W. R. Co. v. United States, 123 F. Supp. 579, 582 (S.D.N.Y., 1954). Kvasnikoff v. Weaver Bros., Inc., 405 P. 2d 781, 783-784 (Alaska, 1965). Uniform Commercial Code Section 2-722. Ninth Street East, Ltd. v. Harrison, 5 Conn. Cir. 597, 529 A. 2d 772, 774 (1968).

The identification of the shipment and the description of the occurrence may be contained in writings from the carrier to the

shipper, Blish, supra. The shipper's intention to claim may also be acknowledged by the carrier in writing, Loveless v. Universal Carloading & Distributing Co., 225 F. 2d 637, 641 (10 Cir., 1955); or it may be inferred from the circumstances of the loss. Insurance Co. of North America v. Newtowne Mfg. Co., 187 F. 2d 675, 680-681 (1 Cir., 1951). American Synthetic Rubber Corp. v. Louisville & N. R. Co., 422 F. 2d 462, 468-469 (6 Cir., 1970). The intent to claim may also be inferred from the fact of complete destruction of the goods. Hopper Paper Co. v. Baltimore & Ohio R.R. Co., 178 F. 2d 179 (7 Cir., 1949) cert. denied, 339 U.S. 943 (1950).

If a shipment becomes nondeliverable, the carrier has a "quasi-fiduciary duty" to notify the shipper and protect the goods. Re Penn Central Transportation Co. and Excel Packing Co., 351 F. Supp. 1348, 1350 (E.D., Pa., 1972). A completely destroyed shipment (one having only salvage value) is nondeliverable and the consignee may rightfully reject it if delivery is tendered. But when a shipment is only partially damaged, the carrier must deliver and the consignee must accept the goods and file claim. Fraser-Smith Co. v. Chicago R. I. & P. R. Co., 435 F. 2d 1396, 1399 (8 Cir., 1971). If a carrier notifies the shipper pursuant to its duty that the shipment has been completely destroyed, the carrier is acting in behalf of the shipper. If the notification is in writing, it substantially complies with the claim requirement of Section 2(b). The notification must necessarily identify the shipment and describe the occurrence.

ARGUMENT

I. Substantial compliance satisfies the claim requirement.

A. Westransco's letter was a claim "filed" with itself.

Westransco's April 19, 1974 letter to the five consignees with copies to American Greetings (R.A., p. 54) contained all of the essential elements of a claim. They identified the shipments by commodity, weight, and shipper, and enclosed copies of the carrier's billing for each shipment. The letter was addressed to the consignee with a copy shown as sent to the shipper, thereby identifying the parties interested in the goods. The letter states that the shipment was "involved in an accident and is considered a total loss." Moreover, the letter specifically states that it is intended "to assist you in filing claim," thus acknowledging the carrier's expectation that a claim would be filed.

No further information would be necessary if the shipper had sent the letter to the carrier. This information sufficiently identifies the shipment and would enable the carrier to make its investigation. This is the purpose of the claim requirement. Georgia F. & A. Ry. Co. v. Blish Milling Co., 241 U.S. 190, 195-196 (1916). An additional letter from the shipper to the consignee would have served no purpose. Hopper Paper Co. v. Baltimore & O. R. Co., 178 F. 2d 179, 182 (7 Cir., 1949), cert. denied. 339 U.S. 943 (1950). As in

Loveless v. Universal Carloading & Distributing Co., 225 F. 2d 637, 641 (10 Cir., 1955), the claim requirement is satisfied by

> "...an acknowledgement in writing by the carrier that damages were sustained by carelessness in transit, and that a formal claim would be filed at some future date when the damages were ascertained. Such writing is nonetheless a claim 'in writing' within the purposes of Sec. 2(b) simply because it takes the form of an acknowledgement of the damages and the cause thereof in the hand of him who is to be held liable when the extent thereof is determined. Certainly it is no perversion of public policy to denominate the carrier's acknowledgment of damages and liability a claim 'in writing' to be formalized when the extent of damages is determinable."

Loveless was mentioned five times in our initial brief, but neither Westransco nor Associated saw fit to discuss that case. No decision we have discovered has ever criticized Loveless. The Sixth Circuit approved Loveless and Hopper in its decision in American Synthetic Rubber Corp. v. Louisville & N. R. Co., 422 F. 2d 462, 468 (6 Cir., 1970):

> "The requirement of a written claim is addressed to a 'practical exigency and is to be construed in a practical way.' Georgia, Florida & Alabama Ry. v. Blish Milling Co., supra. [241 U.S. 190 (1916)]. In accordance with this liberal attitude, the requirement of a claim in writing has been held satisfied where the carrier had actual knowledge of the damage and ha notified the damaged party of the destruction of the shipment. Hopper Paper Co. v. Baltimore & Ohio RR 178 F. 2d 179 (7th Cir. 1949); also where the carrier had inspected the damaged property, noting the apparent damage, had acknowledged in writing that damages were sustained by care-

lessness in transit, and had agreed that a formal claim could be filed when itemized damages were ascertained. Loveless Mfg. Co. v. Universal Carloading & Distributing Company, 225 F. 2d 637 (10th Cir. 1955)." (Emphasis added.)

B. Westransco's letter evidenced more than "actual knowledge."

Both Westransco at p. 5 and Associated also at p. 5, argue that subsequent cases have rejected certain language in Hopper, supra. Actual knowledge of the loss by the carrier, claim Westransco and Associated, is not sufficient to dispense with the claim filing requirements. They cite Insurance Co. of North America v. Newtowne Mfg. Co., 187 F. 2d 675 (1 Cir., 1951); Delphi Frosted Foods Corp. v. Illinois Central R. Co., 188 F. 2d 343 (6 Cir., 1951) cert. denied 342 U.S. 833 (1951); Northern Pacific R. R. v. Mackie, 195 F. 2d 641 (9 Cir., 1952); East Texas Motor Freight Lines v. United States, 239 F. 2d 417 (5 Cir., 1956); Atlantic Coast Line R. Co. v. Pioneer Products, 256 F. 2d 431 (5 Cir., 1958); and Penn State Laundry Co. v. Pennsylvania R. Co., 134 F. Supp. 955 (W.D., Pa., 1955). Each of these cases, except the last, has been distinguished and explained in our initial brief at pp. 19-25.

To prevail in this case, American Greetings need not contend that mere actual knowledge constitutes a claim. Therefore we can accept, at least arguendo, the analysis quoted by Westransco (p. 15) from Penn State Laundry. supra, 134 F. Supp. at 957:

"Although the language of the opinion suggests, contrary to the cases cited above, that actual knowledge may suffice in place of a written claim, subsequent decisions have limited the Hopper Paper case as authority to its factual situation."

Rather, our interpretation of Hopper presumes, in addition to actual knowledge by the carrier:

(a) The shipment is nondeliverable, as opposed to partially damaged.

(b) The nondeliverability resulted from an obvious incident or occurrence (such as a truck accident or rail derailment) which the carrier would ordinarily be expected to investigate absent any claim.

(c) The carrier sends written notice to the shipper of the complete destruction of the shipment within the nine month period for filing of claims.

(d) No prejudice to the carrier results from failure by the shipper to file a written claim; i.e., that the carrier has in its possession all of the information necessary to constitute a claim.

C. Carriers investigate wrecks and notify shippers.

Ordinarily, in the event of a wreck of its vehicle, the carrier will have more knowledge than the shipper, or at least as much, of the circumstances of the loss. "In such a situation" Hopper held "a formal notice by plaintiff to the defendant could not have accomplished anything more." 178 F. 2d at 182. The "situation" referred to was "the wreck and destruction of the carload of paper." Ibid. The situation in the present case, a truck accident, calls with equal urgency for immediate carrier investigation. No carrier would ever wait the full nine month period for claims before investigating this type of accident.

The claim requirement was added to the Uniform Bill of Lading in a form which for present purposes is substantially similar to the present version at the suggestion of the Interstate Commerce Commission. This form was accepted by the carriers and not objected to by shippers. Bills of Lading, 52 I.C.C. 671, 739-740 (No. 4844,1919). At the same time, shippers proposed a separate provision for:

> "...a new rule providing for notice to the consignor and consignee in case of loss resulting in nondelivery of the property, and to the consignor when shipments are refused or unclaimed at destination....
>
> "The shippers advocate the incorporation of such a provision in the proposed bill, because, they say: ...(5) that a rule providing for notice to the consignor in case of loss or destruction of

> the property making delivery impossible would be reasonable, because in such a case knowledge of the fact would be solely in possession of the carrier and prompt notice to the consignor would frequently enable the shipper to minimize his loss and enable him promptly to comply with his contract by replacing the goods;...". 52 I.C.C. at 717-718.

The carriers testified "that they are now exerting themselves to give notice to the consignor of property when it is lost or destroyed in a wreck, or when it is refused or unclaimed at destination." 52 I.C.C. at 719. The Commission therefore rejected the proposed rule, saying, 52 I.C.C. at 720:

> "We perceive many difficulties in the practical application of a hard and fast rule of the character proposed by the shippers. Goods frequently go astray for a long time, and afterwards turn up; packages are sometimes marked in such a careless manner as not to be readily identified with the description in the billing. In such cases, it would be practically impossible for the carrier to comply with the strict letter of the proposed rule to give immediate notice. The only circumstances in which the carrier could give immediate notice of loss or damage would seem to be, as testified to by carriers' witnesses, in case of wreck, and it is now the practice, at least of many of the carriers, to give such notice."

This history makes clear that the crucial circumstance in Hopper, the fact that made notice to the shipper both practical and customary, was the wreck of the carrier's vehicle. We stressed in our initial brief (pp. 8-9, 19) that when goods are nondeliverable,

"a carrier owes a quasi-fiduciary duty to the shipper..." to notify him and minimize the harm. Re Penn Central Transportation Co. and Excel Packing Co., 351 F. Supp. 1348, 1350 (E.D. Pa., 1972).1/ We argued also that a letter sent by the carrier pursuant to this duty was a letter sent on behalf of the shipper. Citing Farah Mfg. Co. v. Continental Airlines, Inc., 524 S. W. 2d 815 (Tex Ct. Civ. App., 1975), we added that if the carrier omitted to fulfill this duty, it would be estopped from relying on the claim requirement.

Neither Westransco nor Associated disputed or indeed even referred to this theory in their briefs. The closest approach to this argument was Westransco's assertion (p. 19) that "the carrier cannot be deemed to be the agent of the shipper to make claim upon itself in behalf of the shipper." That assertion ignores both Georgia, F. & A. Ry. Co. v. Blish Milling Co., supra, and Loveless, supra, in which writings from the carrier constituted part or all of the claim.

D. Carrier disposition of the freight, not retention of salvage proceeds, is significant.

Westransco, nevertheless, argues (pp. 5-6) that the salient fact in Hopper is that the carrier salvaged the goods without the owner's knowledge and failed to account to the owner for the proceeds. Hopper, says Westransco, "has been limited by lower courts in the Seventh Circuit to that precise factual situation...". The court below agreed that retention of salvage proceeds by the carrier was crucial. (R.A., p. 89). This contention cannot withstand serious

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1/ This duty has been codified by the ICC at 49 CFR §1005.6(a).

analysis. As noted in our initial brief (pp. 23-24), the Fifth Circuit in cases cited by the court below explicitly distinguished Hopper on the grounds that the machinery was "not destroyed or taken over by appellant" rather than that the carrier in Hopper retained salvage proceeds.

The only decisions of "lower courts in the Seventh Circuit" on point were Stearns-Roger Corp. v. Norfolk & W. Ry. Co., 356 F. Supp. 1238 (N.D. Ill., 1973), which applied the Hopper doctrine without mention of salvage proceeds; and Henry Pratt Co. v. Stor Dor Freight Systems, Inc., 416 F. Supp. 714 (N.D. Ill., 1975) which distinguished Hopper again without mentioning salvage proceeds. Westransco twice (pp. 16, 20) quoted from the Henry Pratt Co. decision, 416 F. Supp. at 715, but omitted the court's analysis of Hopper on the same page:

> "In the Hopper case, the goods were destroyed by a collision of two of the defendant's trains. After the nine months' period had run, the consignor filed a claim. The court held that it was not barred inasmuch as the carrier had full possession of all the facts, expected that a claim was forthcoming, and had itself notified the consignor in writing. Nothing further would be accomplished by a written claim from the consignor."

This decision nowhere mentions salvage proceeds and its analysis of Hopper is consistent with that urged by American Greetings.

In our initial brief (p. 27) we noted that the court in Hopper could have ordered the carrier simply to pay the salvage proceeds to the shipper if that was the extent of the shipper's

injury. This indeed was the path followed in American Ry. Express Co. Inc. v. The Fashion Shop, Inc., 56 App. D.C. 114, 10 F. 2d 909 (1926). The Seventh Circuit had to be aware of this option, since that case was cited to and distinguished by the court. 178 F. 2d at 181 n. 1. Hopper nevertheless awarded the shipper full recovery for the value of his goods.

E. Westransco's remaining "formidable authorities" are irrelevant.

In addition to the cases already discussed, Westransco presents "the following formidable authorities" (p. 7) which it says are contrary to Hopper: St. Louis, I. Mt. & So. Ry. Co. v. Starbird, 243 U.S. 592 (1917); Southern Pacific Co. v. Stewart, 248 U.S. 446 (1919); and Olson v. Chicago B. & Q. R. Co., 250 Fed. 372 (8 Cir., 1918). These three cases all involve shipments tendered prior to the enactment of the First Cummins Amendment of 1915. See AAACon Auto Transport, Inc. v. State Farm Mut. Auto Ins. Co., 537 F. 2d 648, 654 (2 Cir., 6/1/76). The Seventh Circuit in Hopper distinguished the two Supreme Court cases cited, 178 F. 2d at 181 n. 1, and we think with good reason. In the Starbird case, the consignee gave oral notice of damage to the superintendent of the dock where delivery was made, 243 U.S. at 603; but no notice - oral or written - was given to the carrier's freight agent in charge of the docks, 243 U.S. at 605. Presumably, the freight agent and not the dock superintendent was authorized to receive claims. Cf. Georgia, F & A. Ry. Co. v. Blish

Milling Co., supra, 241 U.S. at 195-196. In these circumstances, the Supreme Court ruled that a written claim was necessary to give "...an opportunity for the delivering carrier to make the examination which it was the principal purpose of the stipulation to afford." 243 U.S. at 606. Both the Starbird case and Southern Pacific Co. v. Stewart, supra, held that the shipper could have filed a claim without stating a definite amount and thereby satisfy the bill of lading requirement before the extent of damages was determined. 243 U.S. at 605-606; 248 U.S. at 448, 450. Neither case involved an accident or occurrence the carrier was bound to investigate at all events; nor was any writing sent by the carrier to the shipper.

The Olson case may be distinguished simply by quoting the sentence immediately preceding the passage quoted by Westransco at p. 10. "Moreover, the [shipper's] telegram of April 23, 1913 was sent and received before the damage was inflicted." 250 Fed. at 376. With this introduction we can readily understand why the carrier's knowledge of the situation "was by no means the equivalent of a notice by the shipper of his claims for damages." This case is very much like Insurance Co. of North America v. Newtowne Mfg. Co., supra, which held that a shipper who presented to the carrier documents written before the loss occurred had not filed a claim. Nor even here was there any extraordinary act or occurrence calling for immediate investigation by the carrier.

In none of the cases cited by Westransco did the carrier have knowledge equal or superior to that of the shipper or consignee

of the cause and extent of the damage nor did the carrier acknowledge in writing to the shipper the essential elements of a claim. In those circumstances, but not in the Hopper situation or in the present case, a claim would still serve a useful purpose. At the least, it would introduce a reasonably contemporaneous writing into the carrier's files which would justify a carrier's payment to the shipper as a lawful settlement of the claim rather than the grant of a rebate. A letter by the carrier is at least as reliable an indication of carrier liability as a claim by the shipper.

II. A claim containing only the information in Westransco's letter is sufficient.

A. The party beneficially interested need not be identified.

The April 19, 1974 letter from Westransco was addressed to the consignee of each of the five shipments, and showed on its face that a copy was sent to American Greetings. (R.A., pp. 47, 54). Both Westransco (pp. 18-19) and Associated (p. 7) assert that a claim for loss or damage must identify the person entitled to recover. For this argument they cite Delphi Frosted Foods Corp., supra. They ignore the analysis in our initial brief (pp. 20-21) of this case. They also completely fail to deal with Kvasnikoff v. Weaver Bros., Inc., 405 P. 2d 781, 783-784 (Alaska, 1965) which rejected that interpretation. As stated in our initial brief, the claims in Delphi were not filed by consignor or consignee or by parties acting in their behalf. These claims were filed by persons who had successfully disclaimed title to the goods and recovered the purchase price from the shipper. 188 F. 2d at 345. The parties filing claim in Delphi thus took a position hostile to that of the beneficial owner of the goods. Under these circumstances there was no agency, express or implied, for them to file claim on behalf of the shipper.

Either shipper or consignee could bring suit against the carrier under Uniform Commercial Code Section 2-722. Therefore, either party could file claim with the carrier to fulfill the condition precedent to suit. This was the holding of Ninth Street East,

Ltd. v. Harrison, 5 Conn. Cir. 597, 259 A. 2d 722, 774 (1968):

> "Even though the risk of loss, subsequent to delivery to the carrier, had passed to defendant, plaintiff nevertheless had the privilege of pressing the damage claim against the trucker. Any recovery on the claim would, however, be held by plaintiff, subject to its own interest, as a fiduciary for defendant."

Under this statute, which is in effect in every state except Louisiana, as interpreted by the Connecticut court, a carrier could very well not know the identity of the beneficial owner of the goods even after a judgment is rendered for the loss. That question could await resolution in a subsequent litigation between consignor and consignee as occurred in Ninth Street East, supra. 1/ If a carrier need not be told the identity of the beneficial owner even after litigation is commenced, clearly the carrier is not entitled to require disclosure of that identity before the claim may be deemed filed.

Westransco argues (p. 19) that "...the carrier cannot be deemed to be the agent of the shipper to make claim upon itself...". If they were, according to Westransco, carriers would "withhold information...rather than risk having their correspondence qualify as claims under the bill of lading." (Ibid.) However the Interstate Commerce

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1/ Of course, the carrier could protect itself by interpleading all claimants. But since U.C.C. Section 2-722(b) requires the party suing to hold the proceeds "subject to his own interest, as a fiduciary for the other party" the risk of separate suits by consignor and consignee is minimal.

Commission, in prescribing the terms of the Uniform Bill of Lading, relied in part upon carrier representations that the carriers' practice was to give consignors notice of wrecks and of refused deliveries. Bills of Lading, supra, 52 I.C.C. at 719. In any event, Farah Mfg. Co., Inc. v. Continental Airlines, Inc., 524 S. W. 2d 815 (Tex. Ct. Civ. App., 1975) held that a carrier is estopped from asserting the claim requirement as a defense if it has so. knowledge of the loss and fails to inform the shipper. (See pp. 9-10 of our initial brief). ICC regulations now require notice. 49 CFR §1005.6(a).

B. The intention to claim can be inferred.

We showed in our initial brief (pp. 21-23) that the shipper's intention to claim damages from the carrier can be inferred from the circumstances. In support of this argument, we cited Insurance Company of North America v. Newtowne Mfg. Co., 187 F. 2d 675, 680-681 (1 Cir., 1951); and also American Synthetic Rubber Corp. v. Louisville and N. R. Co., 422 F. 2d 462, 468-469 (6 Cir., 1970). In this Circuit, a document which did not expressly say it was a claim for damages was deemed sufficient compliance in Delaware, L. & W. R. Co. v. United States, 123 F. Supp. 579, 582 (S.D.N.Y., 1954).

Nevertheless, Westransco argues (p. 19) that this Court has distinguished between notice that goods have been damaged and notice of a claim for recoupment. This case, Anchor Line Ltd. v. Jackson, 9 F. 2d 543 (2 Cir., 1925), relied upon the earlier case of The San Guglielmo, 249 Fed. 588 (2 Cir., 1918) and two decisions of the Third Circuit, The St. Hubert, 107 Fed. 722 (3 Cir., 1901) and The Westminster, 127 Fed. 680 (3 Cir., 1904).

The opinion in Anchor Line was written by Judge Learned Hand, with Judges Hough and Manton concurring. As noted subsequently by the Third Circuit in Delaware Steel Co. v. Calmar S.S. Corp., 378 F. 2d 386, 388 n. 2 (3 Cir., 1967):

> "It merits mention that in the Second Circuit this rule evoked a strong dissent by Judge Hough, one of the most knowledgeable and respected of admiralty judges. In The San Guglielmo, he said: '...the majority holds in substance that a shipper's right to recover for obviously damaged cargo depends on whether a carter or driver is able nicely to distinguish between notice of fact of damage, and notice of claim for damage. If he takes away the goods without using the correct legal formula, his employer's rights are gone.'
>
> "'From this doctrine and the decision applying it I dissent, believing that the only justification for the attempted limitation of carrier's liability is that the carrier is reasonably entitled to knowledge of demands that may be made; more than that is unreasonable.' 249 F. at 591."

The Third Circuit in Delaware Steel Co. v. Calmar S.S. Corp., supra, 378 F. 2d at 388, expressly refused to apply the "early decisions of this court" including both of the Third Circuit decisions relied upon in Anchor Line, supra. The Third Circuit also noted that the strict enforcement of the claim requirement in an ocean bill of lading by the Second Circuit in such cases as The San Guglielmo and Anchor Line had been substantially tempered in The West Arrow, 80 F. 2d 853 (2 Cir., 1936). The decision in this last case was written by Judge Manton, and concurred in by Judges Learned Hand and Chase.

The West Arrow held that a bill of lading requirement that notice of claim must be supplemented by a particularized claim would not be enforced where the shipper failed to submit the particularized claim but surveyors for both parties had inspected the damage within the prescribed period. Judge Hough, who apparently concurred in Anchor Line only because of stare decisis, would certainly have been delighted.

The present rule in the Third Circuit, as expressed in Delaware Steel Co. v. Calmar S.S. Corp., supra, 378 F. 2d at 389 is this:

> "The facilitation of such prompt investigation is the purpose normally served by the early submission of written notice and claim. Since the carrier here had been effectively alerted and had made its investigation in anticipation of a written claim, the tardiness of the subsequent written claim was a matter of no practical consequence.
>
> "We conclude, therefore, that it would serve no legitimate interest of the carrier and would plainly be inequitable to bar this action for failure to file timely written notice or claim. This case turns on its special facts [i.e., actual notice, inspection by the carrier, and substantial compliance] and should not be read as a judicial invitation to shippers and consignees to disregard procedures specified in bills of lading."

The Third Circuit's present position is similar to the attitude of this Court's strictly construing clauses that purport to limit carriers' liability. Toyomenka, Inc. v. S.S. Tosaharu Maru, 523 F. 2d 518, 521 (2 Cir., 1975). This Court has noted that ". .each case

turns on the provisions of the particular bill of lading..." 523 F. 2d at 522. The present case must interpret the provisions of the Uniform Bill of Lading prescribed by the Interstate Commerce Commission, as was also true of American Synthetic Rubber Corp., supra, and Insurance Co. of North America, supra. Those cases are more persuasive than the early and controversial decision of this Court in Anchor Line.

Westransco seeks to support the distinction in Anchor Line by quoting (p. 20) from Henry Pratt Co. v. Stor Dor Freight Systems, Inc., supra, 416 F. Supp. at 715. This passage, also quoted by Associated (pp. 9-10) sets forth several reasons why shippers might not wish to press their claims against carriers. First, the shippers "might be covered by other insurance...". However, in this Circuit insurance companies have been far from reluctant to subrogate the claims of their insured and bring suits against carriers. China Fire Ins. Co. v. Director General, 50 F. 2d 389 (2 Cir., 1931) cert. denied 284 U.S. 658 (1931); AAACon Auto Transport, Inc. v. State Farm Mut. Auto Ins. Co., supra. Second, "...the consignor might prefer to take a tax deduction...". It is strange that a federal court would make that assertion without referring to the provisions of the Internal Revenue Code which would make that choice advantageous to any shipper. Business concerns generally do not act contrary to their financial interests. Even if in some special circumstances a shipper would benefit more from a tax deduction than from recovery

of the value of its goods, that possibility would be so rare as to be safely ignored by the carrier (and its accountants). Finally, the carrier would certainly know and be able to discount the few instances in which "the consignor might be a subsidiary or otherwise have a financial interest in the carrier." These far-fetched and speculative considerations do not relate to any legitimate interest of the carrier. Westransco expected that a claim would be filed in the present case. (R.A., p. 54). Reliance on the type of reasoning in Henry Pratt Co. would serve no legitimate need of the carrier and would only frustrate the equities in favor of a shipper whose goods have been destroyed through no fault of his own.

C. The amount of claim need not be stated.

The amount of claim, as we said in our initial brief (pp. 6-7), need not be stated in order to satisfy the claim requirements. Neither Westransco nor Associated disputed this truth. Indeed, Westransco cited two cases that confirm this point: St. Louis, I. Mt. & So. Ry. Co. v. Starbird, supra, 243 U.S. at 606. Southern Pacific Co. v. Stewart, supra. We take it this point is not in dispute. However, we wonder how the court in Henry Pratt Co., supra, 416 F. Supp. at 715, could feel that a carrier's accountants would be satisfied knowing that a claim had been asserted against the carrier without knowing the amount. The obvious conclusion is that the purpose of a claim is not to improve a carrier's accounting but to make possible

a prompt investigation of the occurrence.

D. ICC claim regulations affect only voluntary carrier payment.

Neither Westransco nor Associated has asserted that the claim regulations prescribed by the Interstate Commerce Commission in Rules, Regulations and Practices of Regulated Carriers with Respect to the Processing of Loss and Damage Claims, 340 I.C.C. 515 (Ex Parte 263, 1972) have any connection with the present case. See 49 C.F.R. Section 1005. We agree that these regulations, in their own terms, simply govern when a claim may "...be voluntarily paid by a carrier..." 49 C.F.R. Section 1005.2(a). These rules have no bearing on the carrier's liability in an action at law. If American Greetings prevails here, Westransco will be paying the claim not "voluntarily" but under the compulsion of a judgment. The ICC acknowledged when prescribing the claim rules that it had no jurisdiction to prescribe substantive rules for the settlement of claims. 340 I.C.C. at 541-542. Any suggestion to the contrary in the Henry Pratt Co. case, 416 F. Supp. at 715 is simply inaccurate.

III. No prejudice to the carriers has occurred.

A. Westransco's letter fulfilled the purpose of a claim.

The purpose of requiring a claim by the shipper is not, as supposed in Henry Pratt Co., supra, to ease the task of a carrier's accountants. This was not the "practical exigency" which the Supreme Court found required the clause "to be construed in a practical way."

Blish, supra, 241 U.S. at 198. "The purpose of the stipulation is not to escape liability but to facilitate prompt investigation." 241 U.S. at 196. Of course, as Westransco emphasizes (p. 18) a carrier may "require reasonable notice of all claims against it even with respect to its own operations." 241 U.S. at 196. However the purpose of that notice is to alert "the managing officers, and those responsible for the settlement and contest of claims..." Ibid. In the present case, Westransco's Claim Agent wrote the April 19, 1974 letter. (R.A., p. 54). No purpose would be served by a shipper's letter to this claim agent repeating the information she had already supplied in writing.

Associated quoted (pp. 3-4) from R. Sigmon, ed., Miller's Law of Freight Loss and Damage Claims (3rd ed., 1967), p. 389[1/] to show the problems involved in a liberal construction of the claim filing requirement. However this text did not purport to be summarizing the legal principles. The first sentence of the paragraph quoted in part by Associated shows that the text is simply giving advice to carriers on how to deal with claims:

> "Even in those instances where the carrier has good reason to believe that if the claimant resorted to litigation the attitude of the court would be liberal and the document or documents involved would be construed by the court to fulfill the requirements of a claim in writing, the carrier, nevertheless, is usually justified in refusing to so construe the document or documents as fulfilling these requirements and in declining voluntary payment."

1/ The identical passage is in the 4th ed. of 1974 at pp. 390-391.

Aside from permitting prompt investigation, the remaining purpose of the requirement for a written claim is to prevent discrimination by the carrier. Lucas Machine Division v. N. Y. Central R. Co., 236 F. Supp. 281, 283 (N.D. Ohio, 1964) as quoted by Associated at p. 5. We showed in our initial brief at pp. 11-18 that no unlawful discrimination would result if American Greetings is allowed to recover in this action. Contrary to the decision of the court below (R.A., p. 89), "strict adherence to the terms of the bill of lading issued pursuant to the Interstate Commerce Act" is not necessary to prevent unjust discrimination in these circumstances. That court's ruling is contrary to the plain language of Blish, supra, 241 U.S. at 198.

B. Associated was not the "delivering carrier;" neither American Greetings nor Westransco need file claim with it.

Associated's major contention in its brief is based upon a fundamental misconception, albeit a misconception shared by the court in the Henry Pratt Co. case. Associated claims (p. 2) to be the "delivering carrier" of the shipments at issue. While Associated was employed by Westransco to perform the final portion of the physical transportation, legally Westransco was "deemed both the receiving and delivering transportation company...". 49 U.S.C. §1013.

Since Westransco is the originating and delivering carrier as defined by the Interstate Commerce Act, Associated is one of the intermediate carriers. Associated asserts (p. 11) that had it received

a timely claim from the shipper, it would have better been able to investigate the nature of the shipment and its value, the owner of the shipment, and the condition of the shipment while in the possession of previous carriers. This overlooks the fact that the shipper is required by Section 2(b) of the bill of lading, as quoted by Associated (p. 3) to file a claim "with the receiving or delivering carrier...or carrier on whose line the loss, damage, entry or delay occurred...". American Greetings could have filed its claim with Westransco and not Associated, or with Associated and not with Westransco. If American Greetings filed the claim with Westransco, Westransco was not bound to communicate that claim to Associated as a condition for recovering for the damage to the shipment occurring while in the possession of Associated. 49 U.S.C. Section 20(12).

Associated evidently believes that in order to secure indemnity, Westransco would have had to file a claim in writing with it. That contention was rejected by this Court in Acme Fast Freight v. Chicago, M. & St. P. R. Co., 166 F. 2d 778, 783-784 (2 Cir., 1948). The Supreme Court reversed this ruling on the grounds that the statute did not consider freight forwarders to be "carriers" entitled to indemnity under 49 U.S.C. Section 20(12). Chicago, M. & St. P. Ry. Co. v. Acme Fast Freight, 336 U.S. 465, 476-477 (1949). Congress then promptly added the talismanic phrase "as a carrier" to the definition of a freight forwarder. Act of December 20, 1950, 64 Stat. 1113, amending §402(a)(5) of the Interstate Commerce Act, 49 U.S.C. Section 1002(a)(5). Since that time, cases have not questioned a freight forwarder's right to

indemnity from underlying carriers pursuant to 49 U.S.C. Section 20(12). Such was the view of Circuit Judge (now Mr. Justice) Blackmun in Republic Carloading & Distributing Co. v. Missouri Pacific R. Co., 302 F. 2d 381, 382 (8 Cir., 1962). Accord: Season-All Industries Inc. v. Merchant Shippers, 385 F. Supp. 517, 518-519 (W.D., Pa., 1974).

The theory behind a receiving or delivering carrier's right to indemnity from the underlying carrier in whose possession the goods are lost or damaged, and the reason that carrier need not be given prompt notice of claim, is explained in United States v. Seaboard Coastline R. Co., 384 F. Supp. 1103, 1105 (E.D., Va., 1974):

> "Further, placing the initial burden of payment upon either the receiving or delivering carrier is not at all unfair since, from receipt to delivery the goods are wholly in the possession of the receiving carrier, the delivering carrier, or one or more intermediate carriers hauling the goods for the benefit of the receiving or delivering carrier. At shipper's option, the courts have considered the receiving or delivering carrier as principal, with any intermediate carriers as agents. Id. [Atlantic Coast Line v. Riverside Mills, 219 U.S. 186 (1911)] at 206-207, 31 S. Ct. 164. Thus, the goods are in the possession of the principal or its agents from receipt to delivery."

This rationale applies with even greater force when the same company is both the receiving and the delivering carrier, and retains the exclusive right to select the underlying carriers to perform the physical transportation of the goods.

The Henry Pratt Co. case completely misinterprets the status of the defendant and third party plaintiff, Stor Dor Freight Systems, Inc., which is a freight forwarder, by saying, 416 F. Supp. at 715:

> "In the case at bar, however, the consignor's claim was against the initiating carrier which had promptly delivered the goods to the railroad and therefore had no further connection with them or with their loss or destruction. A notice to the defendant therefore would have permitted it to perfect its right against the railroad, but until such a notice was served upon the defendant, it had no basis for filing its own claim."

Since Stor Dor was a freight forwarder, it did continue to have responsibility for the goods until final delivery. 49 U.S.C. §1002(a)(5)(B). No notice to the underlying railroad was necessary for Stor Dor to perfect its rights under 49 U.S.C. Section 20(12). Stor Dor could simply have awaited the conclusion of the shipper's action against it, sued the railroad proving that the loss occurred in its possession, and submitted as evidence of the amount due a copy of "any receipt, judgment, or transcript" recovering that amount and "any expense reasonably incurred by it in defending any action at law brought by the owners of such property." 49 U.S.C. Section 20(12). This case, so heavily relied upon by both Westransco and Associated, is therefore wrongly decided on almost every point except, perhaps, its summary of Hopper.

CONCLUSION

For the foregoing reasons, this Court should find that the letters from Westransco dated April 19, 1974 substantially complied with the requirements for filing written claims.

Respectfully submitted,

Martin S. Snitow
Attorney for Appellant
277 Park Avenue
New York, New York 10017
(212) PL 9-1000

OF COUNSEL:

Arsham & Keenan
277 Park Avenue
New York, New York 10017
(212) PL 9-1000

Dated November 24, 1976

CERTIFICATE OF SERVICE

I hereby certify that I have this day served two copies of the foregoing reply brief in this action upon all parties of record by first class mail, postage prepaid, at the addresses designated by them.

Done in the City, County and State of New York this 29th day of November, 1976.

Martin S. Snitow

ADDITIONAL STATUTES CONSIDERED

Section 20(12) of the Interstate Commerce Act, 49 U.S.C. §20(12), provides:

> (12) That the common carrier, railroad, or transportation company issuing such receipt or bill of lading, or delivering such property so received and transported, shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained, the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof, and the amount of any expense reasonably incurred by it in defending any action at law brought by the owners of such property.

Section 402(a)(5) of the Interstate Commerce Act, 49 U.S.C. §1002(a)(5), provides:

> (5) The term "freight forwarder" means any person which (otherwise than as a carrier subject to part I, II, or III of this Act) holds itself out to the general public as a common carrier to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to part I, II, or III of this Act.

Section 2-722 of the Uniform Commercial Code provides:

Section 2—722. Who Can Sue Third Parties for Injury to Goods.

Where a third party so deals with goods which have been identified to a contract for sale as to cause actionable injury to a party to that contract

(a) a right of action against the third party is in either party to the contract for sale who has title to or a security interest or a special property or an insurable interest in the goods; and if the goods have been destroyed or converted a right of action is also in the party who either bore the risk of loss under the contract for sale or has since the injury assumed that risk as against the other;

(b) if at the time of the injury the party plaintiff did not bear the risk of loss as against the other party to the contract for sale and there is no arrangement between them for disposition of the recovery, his suit or settlement is, subject to his own interest, as a fiduciary for the other party to the contract;

(c) either party may with the consent of the other sue for the benefit of whom it may concern.

49 CFR §1005.1 provides:

§ 1005.1 Applicability of regulations.

The regulations set forth in this part shall govern the processing of claims for loss, damage, injury, or delay to property transported or accepted for transportation, in interstate or foreign commerce, by each railroad, express company, motor carrier, water carrier, and freight forwarder (hereinafter called carrier), subject to the Interstate Commerce Act; *Provided, however,* That with respect to the acknowledgement and disposition of cargo claims filed against motor common carriers of household goods, carrier action shall be in accordance with the provisions of § 1056.17 (a) and (b) of Part 1056.

49 CFR §1005.2 and §1005.6 provide:

§ 1005.2 Filing of claims.

(a) *Claims in writing required.* A claim for loss or damage to baggage or for loss, damage, injury, or delay to cargo, shall not be voluntarily paid by a carrier unless filed in writing, as provided in paragraph (b) of this section, with the receiving or delivering carrier, or carrier issuing the bill of lading, receipt, ticket, or baggage check, or carrier on whose line the alleged loss, damage, injury, or delay occurred, within the specified time limits applicable thereto and as otherwise may be required by law, the terms of the bill of lading or other contract of carriage, and all tariff provisions applicable thereto.

(b) *Minimum filing requirements.* A communication in writing from a claimant, filed with a proper carrier within the time limits specified in the bill of lading or contract of carriage or transportation, and (1) containing facts sufficient to identify the baggage or shipment (or shipments) of property involved, (2) asserting liability for alleged loss, damage, injury, or delay, and (3) making claim for the payment of a specified or determinable amount of money, shall be considered as sufficient compliance with the provisions for filing claims embraced in the bill of lading or other contract of carriage.

(c) *Documents not constituting claims.* Bad order reports, appraisal reports of damage, notations of shortage or damage, or both, on freight bills, delivery receipts, or other documents, or inspection reports issued by carriers or their inspection agencies, whether the extent of loss or damage is indicated in dollars and cents or otherwise, shall, standing alone, not be considered by carriers as sufficient to comply with the minimum claim filing requirements specified in paragraph (b) of this section.

(d) *Claims for uncertain amounts.* Whenever a claim is presented against a proper carrier for an uncertain amount, such as "$100 more or less," the carrier against whom such claim is filed shall determine the condition of the baggage or shipment involved at the time of delivery by it, if it was delivered, and shall ascertain as nearly as possible the extent, if any, of the loss or damage for which it may be responsible. It shall not, however, voluntarily pay a claim under such circumstances unless and until a formal claim in writing for a specified or determinable amount of money shall have been filed in accordance with the provisions of paragraph (b) of this section.

(e) *Other claims.* If investigation of a claim develops that one or more other carriers has been presented with a similar claim on the same shipment, the carrier investigating such claim shall communicate with each such other carrier and, pursuant to any agreement entered into between or among them as to the proper disposition of such claim or claims, shall notify all claimants of the receipt of conflicting or overlapping claims and shall require further substantiation, on the part of each claimant of his title to the property involved or his right with respect to such claim.

§ 1005.6 Processing of salvage.

(a) Whenever baggage or material, goods, or other property transported by a carrier subject to the provisions herein contained is damaged or alleged to be damaged and is, as a consequence thereof, not delivered or is rejected or refused upon tender thereof to the owner, consignee, or person entitled to receive such property, the carrier, after giving due notice, whenever practicable to do so, to the owner and other parties that may have an interest therein, and unless advised to the contrary after giving such notice, shall undertake to sell or dispose of such property directly or by the employment of a competent salvage agent. The carrier shall only dispose of the property in a manner that will fairly and equally protect the best interests of all persons having an interest therein. The carrier shall make an itemized record sufficient to identify the property involved so as to be able to correlate it to the shipment or transportation involved, and claim, if any, filed thereon. The carrier also shall assign to each lot of such property a successive lot number and note that lot number on its record of shipment and claim, if any claim is filed thereon.

(b) Whenever disposition of salvage material or goods shall be made directly to an agent or employee of a carrier or through a salvage agent or company in which the carrier or one or more of its directors, officers, or managers has any interest, financial or otherwise, that carrier's salvage records shall fully reflect the particulars of each such transaction or relationship, or both, as the case may be.

(c) Upon receipt of a claim on a shipment on which salvage has been processed in the manner hereinbefore prescribed, the carrier shall record in its claim file thereon the lot number assigned, the amount of money recovered, if any, from the disposition of such property, and the date of transmittal of such money to the person or persons lawfully entitled to receive the same.